

2. NOPV at 4.

7. Statute, Rule, Regulation or Order Allegedly violated: 30 V.S.A. § 7006b.
8. The Department's Recommended Remedial Action(s) (Including Civil Penalties): Civil penalty in the amount of Two Hundred Dollars (\$200.00) and attendance at a Department- approved underground damage prevention seminar.
9. The Respondent has objected to the remedy recommended by the Department in the NOPV.
10. In support of the Respondent's objection to the NOPV, the Respondent stated: "The phone line services one vacation home which is used 2 to 3 times per year. No one was at the home at the time of the excavation. I was hired to install new culverts. The owner assured me that he saw the installation of the lines and was confident that they were at a depth of 30+ inches. The lines run down the middle of the graveled road. While loosening up the top rock hard gravel the phone line was hit at under 12" with no sand or warning tape. I'm sure that if I was digging with a pick and shovel I still would of hit this line due to it being in the rock hard gravel base. I do realize that the 18" zone should be done by hand. I notified Dig safe that I was installing culverts crossing both electric and phone lines. These culvert locations were marked out. It would have been very helpful if a depth could be stated in this area. I have been in the Excavation business for over 25 years and have never had an issue with dig safe or utilities in the past."³
11. The Department has not filed any additional information, or comments, in response to the Respondent's objection.
12. No party has requested a hearing in this matter.

Discussion

The Dig Safe statute establishes a process for prevention of damage to underground utility facilities. The process begins with excavators giving advance notice to Dig Safe about the approximate location of any intended excavation activities,⁴ and Dig Safe, in turn, notifying all utility companies authorized to serve in that location about the upcoming excavation activities.⁵ The utilities then are required to mark the locations(s) of their underground facilities so that the

3. Letter of Timothy Hill, dated January 1, 2008.

4. 30 V.S.A. § 7004.

5. 30 V.S.A. § 7005.

excavators may take proper precautions to avoid damaging the facilities.⁶ Specific definitions and requirements are set forth in the Dig Safe statute as well as Public Service Board Rule 3.800, and penalties may be imposed by the Board when it finds a violation of the statute.

In this case the Department has alleged that the Respondent violated 30 V.S.A. § 7006b, which provides in relevant part:

Any person engaged in excavating activities in the approximate location of underground utility facilities marked pursuant to section 7006 of this title shall take reasonable precautions to avoid damage to underground utility facilities, . . . Powered or mechanized equipment may only be used within the approximate location where the facilities have been verified.

Because this is a civil matter, the Department has the burden of proving the allegations in the NOPV, by a preponderance of the evidence.⁷ Hence, the Department must show that it is more likely than not that the Respondent did not take reasonable precautions to avoid damage to the telephone facilities in this case.

The Department's statement of evidence suggests that the Respondent did not take reasonable precautions to avoid damage because it utilized a backhoe to excavate within 18" of clearly visible surface paint marks that accurately identified the location of VTEL's underground utility facilities. The Respondent stated that the property owner for whom the excavation was being done had assured the Respondent that the utility facilities were buried more than 30 inches deep, and the Respondent had dug less than 12" deep before hitting the facilities. In addition, the Respondent stated that the utility line would have been hit even if digging had been done with a pick and shovel because the line was located in the rock hard gravel base. Nevertheless, the Respondent also stated "I do realize that the 18" zone should be done by hand."⁸

The information provided in this case indicates that the Respondent decided to use a backhoe to initiate the excavation based on assurances of the property owner concerning the depth location of the facilities, and an assessment about the degree of force necessary to break the

6. 30 V.S.A. § 7006.

7. *Livanovitch v. Livanovitch*, 99 Vt. 327, 131 A. 79 (1926).

8. Letter of Timothy Hill, dated January 1, 2008.

ground surface. However, the Respondent did not assert that hand digging would have been inadequate to accomplish breaking the ground surface, and the Respondent was aware that hand digging within the 18" marks was a preferable course of action. Hence, we find that it is more likely than not that the Respondent failed to take reasonable precautions to avoid damage to the underground facilities, and thereby violated the provisions of 30 V.S.A. Section 7006b, as alleged in the NOPV. We also conclude that the remedial action proposed in the NOPV is appropriate, and should be imposed.⁹

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. Within thirty days of the date of this Order, SJT Excavating shall pay a civil penalty in the amount of Two Hundred Dollars (\$200.00) by submitting to the Public Service Board a check in that amount made payable to the State of Vermont; and
2. SJT Excavating shall attend an Underground Damage Prevention Seminar at such time and place as designated by the Vermont Department of Public Service.

9. *See*, Public Service Board Rule 3.807(G).

Dated at Montpelier, Vermont, this 30th day of June, 2009.

<u>s/ James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/ David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/ John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: June 30, 2009

ATTEST: s/Susan M. Hudson

Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.